UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CALVIN S. VANN, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER PH043285A0564 DATE: OCT 1 1 1988

David B. Schultz, Esquire, Virginia Beach, Virginia, for the appellant.

Robert Gilson, Norfolk, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the addendum initial decision issued February 21, 1986, that denied his motion for an award of attorney fees. The Board DENIES the appellant's petition for review because it fails to meet the Board's criteria for review under 5 C.F.R. § 1201.115. However, pursuant to its authority under 5 U.S.C. § 7701(e)(1)(B), the Board REOPENS this appeal on its own motion and AFFIRMS the addendum initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

The appellant was demoted from the WG-10/5 position of Sheet Metal Mechanic (Aircraft) to the WG-8/1 position of Sheet Metal Worker (Aircraft) for unacceptable performance in two critical elements of his position. He petitioned the Board's Philadelphia Regional Office for appeal of the agency's demotion action. Prior to the scheduled date for the hearing, the parties submitted a settlement agreement[1] and requested that it be made a part of the record. The administrative judge accepted the agreement into the record and, based on its terms, dismissed the appeal. Neither party petitioned for review and the initial decision therefore became the Board's final decision on the merits of the appeal.

The appellant filed a motion for attorney fees in the amount of $4,290.90. The administrative judge denied the motion, finding that, while the appellant was the prevailing party, there had been no showing that the agency acted in bad faith in pursuing the action. The administrative judge also found that there were enough deficiencies noted in the appellant's work so that the agency did not know it could not prevail against him on the merits. In addition, because of

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[1] The agreement provided in pertinent part as follows: (1) The agency would cancel the demotion; (2) the appellant would be voluntarily changed to the lower-graded position, effective the same date as the demotion was to have been effective; (3) the appellant would be noncompetitively repromoted to his previous position, approximately two months later; and (4) the appellant would withdraw his appeal and an EEO complaint he had filed earlier. *See* Appeal File, Tab 7.

these deficiencies, the administrative judge found that the agency's action was not clearly without merit. The appellant has now petitioned for review of the addendum initial decision.

PETITION FOR REVIEW

In his petition for review, the appellant contends that fees are warranted because: (1) The agency acted in bad faith; (2) the action was clearly without merit; and (3) the agency knew or should have known that it could not prevail on the merits.

ANALYSIS

Pursuant to 5 U.S.C. § 7701(g)(1), the Board may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit. The Board's regulations reiterate the pertinent portions of the statute. 5 C.F.R. § 1201.37(a). In *Sterner v. Department of the Army*, 711 F.2d 1563, 1566 (Fed. Cir. 1983), the court held that an employee is entitled to an award of attorney fees under the statute if: (1) The employee is a prevailing party on the merits of the case, and (2) the award is warranted in the interest of justice. The court also confirmed the

validity of the guidelines that the Board established in *Allen v. United States Postal Service*, 2 M.S.P.R. 420, 434-35 (1980). Those guidelines encompass a set of five broad categories of cases in which an award of attorney fees fits within the statutory framework.

In *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980), the Board held that the *Allen* criteria apply as well to an appeal terminated prior to a final decision. The Board has recognized that although an appellant's burden of proving his entitlement to attorney fees is especially difficult to meet where the case is disposed of prior to full adjudication, the burden must be met nonetheless. *See Kemper v. Department of Housing and Urban Development*, 9 M.S.P.R. 231, 233 (1981); *Carpenter v. Bureau of Alcohol, Tobacco, and Firearms*, 5 M.S.P.R. 422, 425 (1981). As a logical extension of these prior Board holdings, we now hold that the *Allen* criteria apply equally in cases where a settlement is reached prior to a decision on the merits, and that appellants in such situations must establish their entitlement to fees under 5 U.S.C. § 7701(g)(1) based on the record before the Board at the time the appeal was dismissed, as supplemented during the attorney fee proceeding.

Our decision in *Allen* was based upon a thorough review and analysis of the legislative history of the Civil Service

Reform Act. As a result of that inquiry, the Board was able to discern congressional intent in passing section 7701(g). The Board found that the examples discussed in Congress, although admittedly not exhaustive, were illustrative of those circumstances that would be considered to reflect the interest of justice in cases before the Board. Because the categories embody Congress's expressed intent with respect to fee awards, the Board has applied them in other types of cases, despite the fact that the *Allen* categories were developed in the context of an adverse action appeal. *See, e.g., Simmons v. Office of Personnel Management*, 31 M.S.P.R. 559 (1986) (retirement-related appeals); *Young v. Department of the Air Force*, 29 M.S.P.R. 589 (1986) (performance-based actions); *Johnson v. Department of the Interior*, 24 M.S.P.R. 209 (1984) (reduction-in-force appeals). *See also Kent v. Office of Personnel Management*, 33 M.S.P.R. 361, 365 (1987) ("we may profitably look to the legislative history to ascertain Congress's intent with respect to other types of actions [than adverse actions]"). Based upon our review of the legislative history of the Civil Service Reform Act, we find no basis upon which to modify the *Allen* criteria in cases which settle prior to formal adjudication. While nothing in that history speaks directly to this situation, none of the criteria become

inapplicable to all settled cases simply as a result of their having been settled.[2]

The appellant in this case focuses on categories two, three, and five to support his request for fees. He contends that the agency's action was clearly without merit (category two), that the agency initiated the action against him in bad faith (category three), and that the agency knew or should have known that it would not prevail on the merits when it brought the proceeding (category five). However, as the administrative judge noted, the appellant's allegation of bad faith on the part of the agency is essentially an inference which he suggests may be drawn from the agency's action in continuing to prosecute the case against him when it was well aware it could not prevail on the merits of the case. See Addendum Initial Decision at 4. Thus, in our view, apart from his "clearly without merit" argument, the appellant's claim is essentially a claim of entitlement under category five.

In *Yorkshire v. Merit Systems Protection Board,* 746 F.2d 1454 (Fed. Cir. 1984), the court described how a request for fees under category five should be analyzed. The appropriate

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[2] Nonetheless, because of the truncated record in most settled appeals, there will be inherent difficulty in proving an entitlement to fees in such cases. Just as the Supreme Court has warned that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983), the purposes of settlement will largely be lost if the fees proceeding becomes the first in settled cases. The parties, after all, agreed to forego a full trial and decision on the merits in favor of their settlement. We emphasize, therefore, that the parties should make every effort, during the course of their negotiations, to settle any potential liability for fees as well.

procedure is to appraise the agency's decision to carry through the action against the employee. If the agency never possessed trustworthy, admissible evidence, then the agency "knew or should have known" not to take the action. *Id.* at 1457. Examining the evidence and information available to the agency prior to the time it initiated the action, we note that the record is replete with examples of the appellant's unsatisfactory performance under the more subjective performance standards[3] of the two cited critical elements. Agency File, Tabs 7, 12, 13, 15, 16, and 17. Thus, as the administrative judge found, based on the evidence available to the agency, there was a reasonable likelihood that it could have prevailed on the merits.

However, in deciding whether fees are warranted in the interest of justice, the Board may look beyond the parties'

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[3] Critical element one requires the incumbent to perform disassembly, rework, assembly, and operational checks on various aircraft subassemblies. The "marginal" performance standard states that the incumbent requires more than normal supervision to maintain productivity. Critical element two requires the incumbent to interpret and work from the following: Oral instructions, blueprints, schematics, sketches, overhaul/maintenance manuals, engineering instructions, and technical directives. The "marginal" performance standard states that the incumbent requires assistance and instructions to utilize workbooks or manuals after initial instructions, or demonstrates limited ability to read, interpret, and work from basic blueprints. *See* Agency File, Tab 1.

pleadings[4] and the administrative judge's analysis. *See Quick v. United States Postal Service*, 7 M.S.P.R. 583 (1981). The remaining *Allen* category arguably at issue in this case,[5] and one which the administrative judge addressed in part, is category two-where the agency's action was clearly without merit, or was wholly unfounded, or the employee is substantially innocent of the charges brought by the agency. In making such a determination, the competing interests to be examined are the degree of fault on the employee's part and the existence of any reasonable basis for the agency's action. *Allen*, 2 M.S.P.R. at 434 n.35. In this case, we find, based again on the numerous examples of the appellant's unsatisfactory performance under his critical elements, that his work was flawed and that the agency, therefore, had a reasonable basis upon which to take action against him. *See* Agency File, Tabs 7, 12, 13, 15, 16 and 17.

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[4] Under the Board's current regulations, when an employee files a motion for attorney fees, he must state why he believes he is entitled to an award and identify the specific applicable statutory standard or standards under which he believes his entitlement is justified. *See* 5 C.F.R. § 1201.37(a)(2); *Cruz v. United States Postal Service*, 32 M.S.P.R. 565, 567 (1987). However, because this case predates this modification of the Board's regulations, we find it appropriate to examine all of the *Allen* categories, not just those the appellant specifically pleaded.

[5] *Allen* categories one and four, respectively, are inapplicable since there has been no finding that the agency in this case engaged in a prohibited personnel practice or committed a gross procedural error which prolonged the proceeding or severely prejudiced the employee.

Accordingly, we find that an award of attorney fees in this case is not warranted in the interest of justice, either on the bases asserted by the appellant or on any other basis.

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal, if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.